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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452.

CHARLES A. McCULLOCH, Farmer-Debtor.
No. 506. In Bankruptcy.

CHARLES A. McCULLOCH, Appellant,
vs.
WILBUR L. LOFTUS, Appellee.

DECISION ENTERED JULY 2, 1940.

PENDING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

CHARLES A. McCULLOCH,
Petitioner.

C. R. McBRIDE,
New Albany, Ind.,

HON. WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

WHITEFIELD-SCOTT CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452.

IN THE MATTER OF
CHARLES A. McCULLOCH,
Farmer-Debtor.

CHARLES A. McCULLOCH,
Petitioner,

v.

WILBUR L. LOFTUS,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois.

Entered on the Docket September 20, 1940.

PETITIONER'S BRIEF.

HISTORY.

This petitioner filed his initial petition and schedule as a Farmer-Debtor under the Frazier-Lemke Moratorium Act of the Congress May 28, 1937. No. 505. In Bankruptcy.

July 16, 1937, a second schedule was prepared by petitioner's former attorney, Charles Fox, son of Special Master Wilmer T. Fox, from which schedule the LaFollette Real Estate Sale's Contract was omitted

as an asset on the advice of said attorney who stated that petitioner's rights had expired. Which schedule was filed July 20, 1937. Said attorney Fox withdrew from the case July 16, 1937, and petitioner having learned that his rights under the LaFollette contract of January 2, 1930, had not expired he attempted to file a third schedule August 7, 1937. Conciliation Commissioner, Robert C. Bulleit, was attorney for LaFollette in the proceedings to annul the contract and when Bulleit's successor, Charles P. Tighe, was appointed, May, 1939, the discovery was made that the LaFollette schedule had not been placed of record and said third schedule was filed shortly thereafter (see last two lines of Par. 1, R. 3).

For a period of more than two years after filing as a Farmer-Debtor, aforesaid, the farmer status of petitioner was not legally challenged, though four attorneys, including the Conciliation Commissioner, whose clients had been restrained by the proceedings under No. 505 had discussed the matter at the advertised meeting of creditors held August 7, 1937, though petitioner welcomed them to do so at said meeting.

STATEMENT OF PENDING CASE.

In April, 1939, respondent, Loftus, discussed with petitioner's attorney, Mr. McBride, the matter of purchasing from the Receiver of the New Albany National Bank the McCulloch note asset, which is secured by mortgage on real estate, proposing that if he, respondent, became the creditor he would, with the approval of the District Court, accept a deed from debtor for the

business part of the mortgaged real estate and release the mortgage which would leave the title to the part of the real estate which is improved by a frame cottage vested in petitioner and free from said mortgage lien. Upon the advice of said attorney, petitioner and his wife executed an acceptance of said proposal (See "F" R. 93). This proposal, if it had been completed, would have given petitioner's composition proposal a majority in values as well as a majority in number of petitioner's creditors because this claim constituted a majority in values of all secured claims, for which reason Attorney McBride advised acceptance of respondent's proposal.

NATURE OF PENDING CASE.

The pending cause was initiated by respondent, praying that petitioner's application for relief under the Act in question, No. 505, In Bankruptcy, which petitioner had filed May 28, 1937, as heretofore stated, be dismissed.

On June 9, 1939, respondent acquired the status of a creditor of petitioner by purchase and assignment of the said McCulloch asset from the Receiver of the New Albany National Bank, mortgagee, permission to make the sale and transfer having been granted by the department in Washington, D. C.

On June 27, 1939, respondent filed his verified motion attacking petitioner's farmer status. But in the meantime respondent had made no attempt to fulfill his proposal though petitioner and his wife were ready

at all times to complete the transaction. The same date respondent's petition to dismiss was referred by the District Court to Wilmer T. Fox, Jeffersonville, Indiana, as a Special Master in Chancery, who was directed to take testimony concerning the same and to report said testimony with his findings of fact and conclusions of law thereon to the Court (R. 2). On July 21, 1939, petitioner filed with the Special Master a motion to dismiss the motion of respondent on the ground that it was not filed in time and on the further ground that the case of *In re McCulloch,* 100 Fed. (2d) 939, which was decided by the Circuit Court of Appeals, 6500, December 22, 1938, precluded a consideration of respondent's motion because of the doctrine of *res adjudicata* (R. 3, 4). Petitioner believes that if said motion to dismiss respondent's motion had been filed in sufficient time with the Judge of the District Court prior to the date of the hearing, July 21, 1939, this case would have been ended at that time for the reason that the Frazier-Lemke Law permits a petitioner to file as a Farmer-Debtor under his oath and there had been no sufficient proof to the contrary submitted prior to July 21, 1939, and it is confidently believed that none was filed that day, nor since.

But on said July 21, 1939, the Special Master heard the evidence and on September 8, 1939, found the facts specially and reported his conclusions of law in favor of respondent (R. 74-81). Petitioner objects to the Special Master's conclusions of law in excluding the testimony of honest, truthful, actual farmers as incompetent because they do not qualify as expert wit-

nesses, and in stressing the absence of petitioner's wife from the witness stand as a serious confession of lack of merit in petitioner's farmer status. These farmer witnesses are petitioner's near neighbors, all of whom knew petitioner May 28, 1937, the vital date in this proceeding, and since said date, many of whom have known petitioner all of his life, or their own, and most of them surely qualify as experts on farming activities. The Special Master's intimation that if Mrs. McCulloch had been called as a witness her testimony would have been unfavorable to petitioner's farmer status does grave injustice to Mrs. McCulloch whose loyalty to petitioner and his interests is beyond question. But, as stated in the petition for the Writ of Certiorari, if her testimony shall be appraised as highly important and be desired, it will be cheerfully supplied by deposition if such be permissible.

On the 16th day of October, 1939, the District Court adopted the special findings of fact previously reported by the Master, as heretofore recited (R. 81). Verbal notice was at once given in open court of intention to appeal, and on October 18, 1939, written notice of such intention was filed.

December 29, 1939, an appeal bond was approved and an appeal to the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois, was allowed (R. 81-89).

February 9, 1940, petitioner's concise statement setting out facts believed to be important in the adjudication of the matter at bar was filed (R. 90-93).

February 14, 1940, the record in the District Court was certified to the Circuit Court of Appeals (R. 94).

As fully recited in petition for Writ of Certiorari, Cause No. 7228, the Circuit Court of Appeals entered judgment adverse to petitioner's welfare, July 2, 1940 (R. 113).

AUTHORITY.

Petitioner relies primarily, fundamentally and absolutely upon the rulings of this Court in First National Bank & Trust Company, Trustee, v. Beach, 301 U. S. 435. "A farmer remains a farmer just as a lawyer remains a lawyer," even though his activities have been reduced in his farming life because of sciatic rheumatism and lack of finances.

For emphasis the Court is invited to note the fact that the Beach case recites that he leased a part of his land for grazing and diary purposes. Petitioner asks that the Court take particular notice of the fact that petitioner does the same (R. 16).

Particular attention of the Court is requested to the testimony of Lewis Hartley, R. 58, Noble Smith, R. 44, Peter Roth, R. 44, Fred P. Zipp, R. 54, David Box, R. 40, John Quinn, R. 41, Allie Melton, R. 64, and Martin McCulloch, R. 66.

Petitioner feels assured that the Court will not fail to note that on the cross-examination by counsel for respondent the testimony of all of petitioner's witnesses, with the possible exception of one or two, their

testimony on all points, particularly as to petitioner's farmer status, was strengthened.

Petitioner does not doubt that the Court will note, and disapprove, the frequently displayed unfriendliness of the Special Master toward petitioner throughout the hearing.

Petitioner also assumes that the Court, after consideration of the evidence, will note that the words "preponderance of all the evidence," used in the ruling of the United States Circuit Court of Appeals, Seventh Circuit, No. 7228, should be reversed.

Total of debtor's farming activities for 1940: Amount of cultivation on 14 acres is 11 acres. Received under crop control on the above acres 900 pounds acid phosphate at freight cost. The 10-acre tract on which debtor lives, 4½ acres under cultivation, remaining in pasture. No crop control received. The amount of dairy stock at present is 6 dairy cows, 2 yearling heifers, 2 hogs, 85 laying hens and 130 April chickens. Also harvesting of hay off of McCulloch-Embry tract. The 33-acre dairy farm is still under lease for dairy purposes.

Respectfully submitted,

CHARLES A. MCCULLOCH,
Petitioner.